IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Cr.A.No.32 of 2007

Reserved on: 3rd October, 2007.

Date of Decision : 6th November, 2007

Raj Kumar. …Appellant.

Versus:

State of H.P. …Respondent.

Coram:

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] Yes.

For the appellant: Mr.N.K.Thakur, Advocate. .

For Respondent. Mr.Ashok Chaudhary, Addl. Advocate General.

Sanjay Karol, J.

The present appeal arises out of the judgment dated 24th January, 2007 passed by Additional Sessions Judge, Fast Track Court, Kangra at Dharamsala in S.C.No.14-G/VII/2006, S.T.No.11/2006 titled as State of H.P. Vs. Raj Kumar convicting the accused for an offence under Sections 376 and 341 of the Indian Penal Code (hereinafter referred to IPC) and sentenced to undergo imprisonment for a term of seven years rigorous imprisonment and fine of Rs.25,000/- for the offence under Section 376 I.P.C. and in default thereof to further undergo simple imprisonment for one year. For the offence under Section 341 he was sentenced to undergo simple imprisonment for one month.

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

In view of the ratio of law laid down by the apex Court in *Om Parkash Vs. State of U.P.*, reported in (2006) 9 SCC 787, the name of prosecutrix is described as victim and the appellant-accused is hereinafter referred to as the accused in the judgment.

The case of the prosecution as borne out from the record is as under:

On 23rd May, 2006 the victim, aged 12 years, a student of 5th class of Govt. Primary School, Sarad Dhogri, Tehsil Dehra, District Kangra at about 2 P.M was returning back home after the school was over when before her village she stopped at a temple. The accused was sitting near a Mango tree. She bowed in the temple and the accused asked the victim to play with him. On her refusal the accused grappled her and after tearing her Salwar laid her inside a small pit on the side of the road. After opening his Pant he started rapping her. At that she cried for help and on hearing her cries, her uncle, Balbir Singh who had came to fetch water from the near by well ran towards the place of occurrence and found the accused rapping her. Seeing her uncle, the accused picked up his Pant and started running. Balbir Singh raised an alarm and shouted “Pakroo Pakroo” and started running after the accused where on hearing his cries one Shri Bhag Singh also chased the accused and both apprehended him after some distance and took him to the village. In the meanwhile the victim left for her home. A report was lodged with the Police on telephone by Shri Rajinder Singh (PW-3), on the basis of which F.I.R. No.92 of 2006 under Section 341 and 376 I.P.C. was registered with Police Station, Jawalamukhi on 23rd May, 2006. During the course of the investigation, the victim was medically examined by Dr. Veena (PW-13) and Dr.Kalpana Negi (PW-15) at Dr.Rajinder Parsad Medical College and Associated

Hospital at Kangra. The medical reports are Ext.PW-12/E and Ext.PW-12/A. The accused was also got medically examined through Dr. Vivek Sood (PW-5), who found the accused capable of performing sexual intercourse as per his M.L.C. (PW-5/B). Pant belonging to the accused was also taken into possession for examination and the report of the Chemical Examiner was also obtained. The vaginal swabs and smears of the victim were also sent for chemical analysis. The report of the Forensic Science Laboratory is Ext.PA. Site Plan (Ext.PW-12/C) was prepared. The birth certificate of the victim (Ext.PW-7/A) was taken vide memo (Ext.PW-12/D). The statements of the witnesses were also recorded.

After completing the investigation the challan was presented in the Court for trial and the charges against the accused under Sections 376 and 341 I.P.C. were framed. The accused pleaded not guilty and claimed trial.

In all, the statements of 15 prosecution witnesses were recorded by the trial Court. The statement of the accused under Section 313 Cr.P.C. was also recorded. No evidence was led by him in his defence.

After considering the entire material on record, the court below held the accused guilty of the charged offence and convicted and sentenced him accordingly. The court below based the conviction on the testimony of the victim (PW-2), her uncle Bailbir Singh (PW-1), Bhag Singh (PW-14), Rajinder Singh (PW-3), Neka Ram father of the victim (PW-4), Dr.Vivek Kumar (PW-5), Dr.veena Bhathyarch (PW-13) and Dr.Kalpana Negi (PW-15).

During course of the hearing, the learned counsel for the appellant has assailed the judgment on the following grounds:

(i) That in a broad day light an offence of such nature could not have taken place on the road. It is highly improbable that in broad day light the victim could have been laid naked on the road particularly when 10 to 15 houses were in close vicinity of the place of occurrence.

(ii) Absence of injuries on the body of the victim belies the case of the prosecution.

(iii) The victim has been tutored and has deposed what was read out to her just before the recording of her statement in the Court.

(iv) The victim was medically examined on 24th May, 2006 and the delay is fatal to the case.

(v) The Salwar of the victim, alleged to have been torn by the accused was not produced in the court by the prosecution, which is fatal to the prosecution case.

The ld. Additional Advocate General has vehemently opposed the appeal and made submissions in support of the orders.

I shall first examine the statements of the material witnesses. As per the version of the victim PW-2, on 23.5.2006 while she was returning home from the school at about 2.00 P.M. she saw the accused sitting near the well. She bowed in the temple when the accused asked her to play with him to which she replied that she had to back home. The accused grappled her and thereafter tore off her Salwar and laid upon her to commit rape. She felt pain and cried when her uncle Bailbir Singh (PW-1) came and inquired and on seeing him the accused ran away at which her uncle raised an alarm and ran after him. The accused was caught by her uncle. In her cross-examination she has denied the suggestion that the boy who ran away after seeing her uncle

had not been recognized by her. She has admitted that she was frightened when the boy grappled her and tore off her Salwar. She has stated that her uncle was at a distance of 10 meters when the accused had seen him and had run away from the place of occurrence. She has admitted that the statement recorded by the Police had been read over to her, however, she has clarified that her statement recorded in the Court is the same statement that she had made before the Police. She has admitted the suggestion put to her that on seeing her uncle the boy had run towards the Khud. She has denied that the accused had been implicated on the basis of suspicion.

As per the version of the victim she cried her uncle heard the same and came. Importantly, there is no cross-examination by the accused on this point. The only suggestion is that the boy who ran away from the spot was not recognized by PW-2.

As per the version of PW-1 on 23rd May, 2006 he had gone to fetch water from the well when he heard cries coming from the direction near the Mango tree. He found that in a small pit, approximately 2 feet in length and width the victim was lying naked on the ground and the accused with his pants off was lying on the victim and committing rape. The victim was crying. When he inquired the accused picked up his Pant and ran away and at that he raised an alarm and called “Pakroo Paktroo”. Bhag Singh (PW-14) also ran after the accused and after chasing him for some distance the accused was caught. The matter was reported to the Police by Rajinder Singh (PW-3) and the accused was handed over to the Police. The police reached the spot and recorded his statement (Ext.PW-1/A). He has been cross examined at length and it has come in his cross-examination that there are no shops near the temple and the fields are

also not cultivated. The place of occurrence is a vehicular road and his house is at a distance of approximately ½ Km. from the temple. No suggestion has been put to this witness that he ran after a wrong person and the person who actually ran after committing the rape was not followed by him.

As per the version of Shri Rajinder Singh (PW-3) some of the villagers had caught hold of the accused and he had informed the Police on the phone. Nikka Ram (PW-4) has deposed that the age of his daughter was 12 years and his brother Balbir Singh (PW-1) told him that she had been raped. In his cross-examination he has admitted that two paternal aunts of the accused reside in the boundary of the village. Bhag Singh (PW-14) has corroborated the version of PW-1.

From the line of cross-examination of all the aforesaid witnesses, what emerge is that the presence of the accused at the place of occurrence is not disputed. In fact in his statement recorded under Section 313 Cr.P.C. the accused has taken a defence that he was on his way to his aunts house and when he reached near the temple, a dog ran after him and in order to save himself he ran from there and on the basis of suspicion he was caught under mistaken identity and beaten up by the villagers who did not listen to him. It is thus an admitted position that the accused was present at the time and place of occurrence of the offence and he had run away from there. However, the defence taken is that he run to save himself from the dog and was nabbed on the ground of suspicion.

The victim in unambiguous and unequivocal terms has stated that the accused grappled her, tore off her Salwar and after laying on her committed rape. This version is corroborated by the statement of

PW-1 who came at the spot after hearing the cries of the victim and saw the accused committing rape. He has further deposed that on seeing him the accused ran away with his pants and after some chase was nabbed by him and Bhag Singh (PW-14). Both the witnesses have identified the accused.

There is nothing on record to suggest as to why the said witnesses would have been falsely deposed against the accused. From the statements of PW-1 and PW-2, it is clear that it was the accused who had himself committed the offence. The statements of all the aforesaid witnesses would show that there depositions are absolutely trust worthy and their credibility is unimpeachable. They are clear, unambiguous and totally reliable.

Dr.Vivek Kumar (PW-5) has medically examined the accused and certified the accused to be capable of performing the sexual act. Dr.Veena (PW-13) deposed that she had examined the victim on 24th May, 2006 and she had referred the matter to the Gynecologist for examination and expert opinion. Dr.Kalpana Negi (PW-15), Medical Officer, Zonal Hospital, Dharamshala, on the basis of her opinion Ext.PW-15/A has deposed that external genetelia-labia majora was normal and in labia minora there was redness. Hymen was intact but it was red and tender. One small finger was admitted in the vagina. There was no bleeding or discharge. She had taken smear from introituses and vagina which were sent for Chemical Examination for sampling. She has opined that the redness and tenderness found in the labia minora and hymen is possible if penetration is attempted. In her cross-examination she has deposed that the observation of PW-13 with respect to examination of labia majora was on the basis of the external examination. She has

admitted the suggestion put by the accused that the redness is possible due to infection and if sexual assault is made on uneven and rough surface on a child victim possibility of injuries on the bottom cannot be ruled out.

In *Tarkeshwar Sahu Vs. State of Bihar (Now Zharkhand*) , (2006) 8 Supreme Court Cases 560 and *Bhupinder Sharma Vs. State of H.P* (2003) 8 Supreme Court Cases 551, the Court has held that even slightest of penetration is sufficient for conviction under Section 376 I.P.C and the proof of rupture of hymen and actual emission of semen is not necessary.

In *State of M.P. Vs. Munna Choubey and another, (2005) 2* Supreme Court Cases 710, the court has held as under:

> "The offence of rape occurs in Chapter XVI IPC. It is an offence affecting the human body. In that chapter, there is a separate heading for "Sexual offences", which encompasses Sections 375, 376, 376-A, 376-B, 376-C and 376-D. "Rape" is defined in Section 375. Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e. sections 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is "the ravishment of a woman, without her consent, by force, fear or fraud", or as "the carnal knowledge of a woman by force against her will". "Rape" or "raptus" is when a man hath carnal knowledge of a woman by force and against her will (Co.Litt. 123-b); or as expressed more fully, "rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will" (Hale PC 628). The essential words in an indictment for rape

> are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon. 6, 1a, 9 Edw. 4, 26a (Hale PC 628). In the crime of rape, "carnal knowledge" means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's Criminal Law, 9th Edn., P.262). In Encyclopedia of Crime and Justice (Vol. 4, p.1356) it is stated ".....even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (4th Edn.), Vol.12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman---an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order"
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> **(Emphasis supplied)**

In *Madan Lal Vs. State of J&K* (1997) 7 Supreme Court Cases 677, the Court has held as under:

> "The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove that an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it cannot be held that it was a case of mere assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with Section 511, I.P.C."

In *Ranjit Hazarika Vs. State of Assam*, reported in (1998) 8 SCC 635, the Court has held that non rupture of hymen and absence of injury on the victim's private parts does not belie her testimony even if in the opinion of the doctor no rape had taken place and that in itself would not be a ground sufficient enough to otherwise throw out a cogent and trustworthy evidence of the victim.

In *Om Parkash* (supra), it has been held that even if doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix.

S.I.Ranjit Singh (PW-12) is the police official who has carried out the Investigation. All the other witnesses, namely, Surender Singh (PW-6), H.C.Thakru Ram (PW-8), Constable Pardeep Kumar (PW-9), ASI Tilak Raj (PW-10), H.C.Ashok Kumar (PW-11) and S.I.Ranjit Singh (PW-12) are the police officials who have been associated in the investigation and have prepared various documents on record.

The offence has taken place at about 2.30 P.M. during the summer season at a place which is extremely hot. It has come on record that there are no shops and houses in close vicinity of the temple. In the cross-examination of PW-1 it has come that even the fields are not cultivated. The road where the offence is taken place is not a busy road and the presence of the accused at the time and place of occurrence is admitted. Therefore, the contention of the learned counsel for the appellant that it is highly improbable that accused would have committed the offence in broad day light on the road is not acceptable. In fact the submission is contrary to the line of defence taken by the accused. In cross-examination a suggestion was put to PW-2 that the, boy who

grappled and tore off her Salwar, frightened her and committed rape and run away in the direction of the Khud after seeing her uncle.

In the present case the victim has admitted that she was scared of the fact that she had been grappled and her Salwar had been torn off. The contention of the learned counsel that she was terrified to even apprehend what was going and make resistance at the time of commission of the crime. PW-2 was just about 12 years of age when the offence took place. No doubt she has admitted that the statement was read over to her by the Police and she was asked to narrate the same in the Court. Her statement is corroborated by the statements of the other witnesses and in fact she has clarified that the statement which was written by the Police was the very same statement which she had made in the court. The child has undergone immense, agony and trauma . It is not the case of tutoring of the witnesses but of the re-collection of events by refreshing herself of her statement made to the police. Therefore, it cannot be said that the child had been tutored to depose against the accused. The accused did not confront PW-2 with her statement recorded under Section 161 Cr.P.C. It is not the case of the accused that there is an improvement in the statement of the victim.

The cross-examination of the witnesses has not brought out anything which would show the version of the prosecution to be false, concocted or that the accused has been falsely implicated on account of animosity. In the present case as would be seen, the victim has leveled such allegation which would have devastating affect on herself and also on her family, therefore, it is very unlikely that she would have come forward with a false version on the basis of suspicion Even the family members would refrain from doing so. In the Indian society future

chances of getting married and settling down in a respectable or acceptable family are greatly marred. On the critical examination of the above evidence, in my considered opinion the cross-examination conducted by the appellant and also the examination of the defence witnesses could not cause any dent to the case of the prosecution. In the aforesaid facts and circumstances, the statement of the victim itself inspires confidence and there is enough corroboration of her statement lent by the other witnesses.

The next contention of the learned counsel is that there is delay in the medical examination of the victim. The incident took place on 23rd May, 2006 and the victim was examined on 24th May, 2006. The record suggests that no lady doctor was available at the Govt. Hospital at Dehra i.e. the place of occurrence, therefore the victim had to be taken to the District Zonal Hospital at Dharamshala which was at some distance and therefore the delay in the medical examination of the victim stands sufficiently explained.

The learned counsel has further submitted that the Salwar of the victim was not produced in the Court. In *Dhanaj Singh and others Vs. State of Punjab*, (2004) 3 Supreme court Cases 654, it has been held that defective investigation in itself would not be a ground for acquitting the accused though in such a case the Court has to be circumspect while evaluating the evidence.

The fact that no injuries were found on the body of the accused in itself would not be a ground to disbelieve the prosecution version. In *State of Rajasthan Vs. N.K. the accused*, reported in (2000) 5 SCC 30 and *Balwant Singh and others Vs. State of Punjab* AIR 1987 Supreme court 1080, the Apex Court has held that the absence of injuries

on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix.

In *Rafiq Vs. State of U.P.* (1980) 4 SCC 262, the court has held as under:

> "When no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken by the victim strikes a judicial mind as probable….When a woman is ravished what is inflicted is not merely physical injury, but 'the deep sense of some deathless shame'…..Judicial response to human rights cannot be blunted by legal bigotry."

Ext.PW-12/C does not indicate that there are any houses near the temple and the place of occurrence. In fact PW-1 has stated that the fields are un-cultivated and the shops are at a distance of 1 Km. from the temple. His house is at a distance of ½ Km from the temple and there are seven houses near his house. The submission of the learned counsel to the effect that there are houses in the vicinity of the temple is, therefore, incorrect. Even otherwise it is nobody's case that other persons were present in their houses at the time of the commission of the offence.

In *State of Punjab Vs. Gurmit Singh*, reported in AIR 1996 Supreme Court 1393, the Supreme Court while examining the question as to why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion?, has stated that the Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge

leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused.

In *State of H.P. Vs. Shree Kant Shekari*, reported in (2004) 8 SCC 153 and *State of H.P. Vs. Lekh Raj and another*, (2001) 1 Supreme Court Cases 247, the Apex Court held that the testimony of a prosecutrix can be acted without corroboration in material particulars. However, if the Court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice..

Therefore, taking the overall view of the evidence of the prosecution as brought on record, it is reliable, trustworthy and inspires confidence and I have no hesitation in accepting it and coming to the conclusion that the accused has committed rape on the victim who was a minor at that time being under the age of 12 years.

It has come on record through the statements of the doctors that there was redness and tenderness in the hymen and redness in the labia minora which is possible if penetration is attempted. Her body is not fully developed. The age of the victim has been duly established through the statements of Nikka Ram (PW-4), father of the victim and also Dinesh Kumar (PW-7) who has duly proved the Panchayat record (Ext.PW-7/A). The accused has been found to be medically fit to commit the offence of rape.

From the statements of the witnesses and the medical evidence on record, it cannot be said that the accused is not guilty of the charged offence. The victim was a young child of 12 years of age and was returning back to her home after attending her school. The accused

grappled and caught hold of the victim, torn off her Salwar, opened his Pant and lay upon her to commit the offence of rape. His presence at the time and place of occurrence is admitted. She was prevented from going back to home.

The court below has correctly appreciated the material on record and has arrived at its conclusion. There is no illegality or perversity in appreciating the same. I see no reason to interfere with the same. The appeal is accordingly dismissed.

6th November, 2007 **(Sanjay Karol)**
(r/TM) Judge.